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Supreme Court of the United States

OCTOBER TERM, 1930.

No. 543.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
Petitioner,

vs.

NOAH MOQUIN,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF A WRIT OF CERTIORARI.

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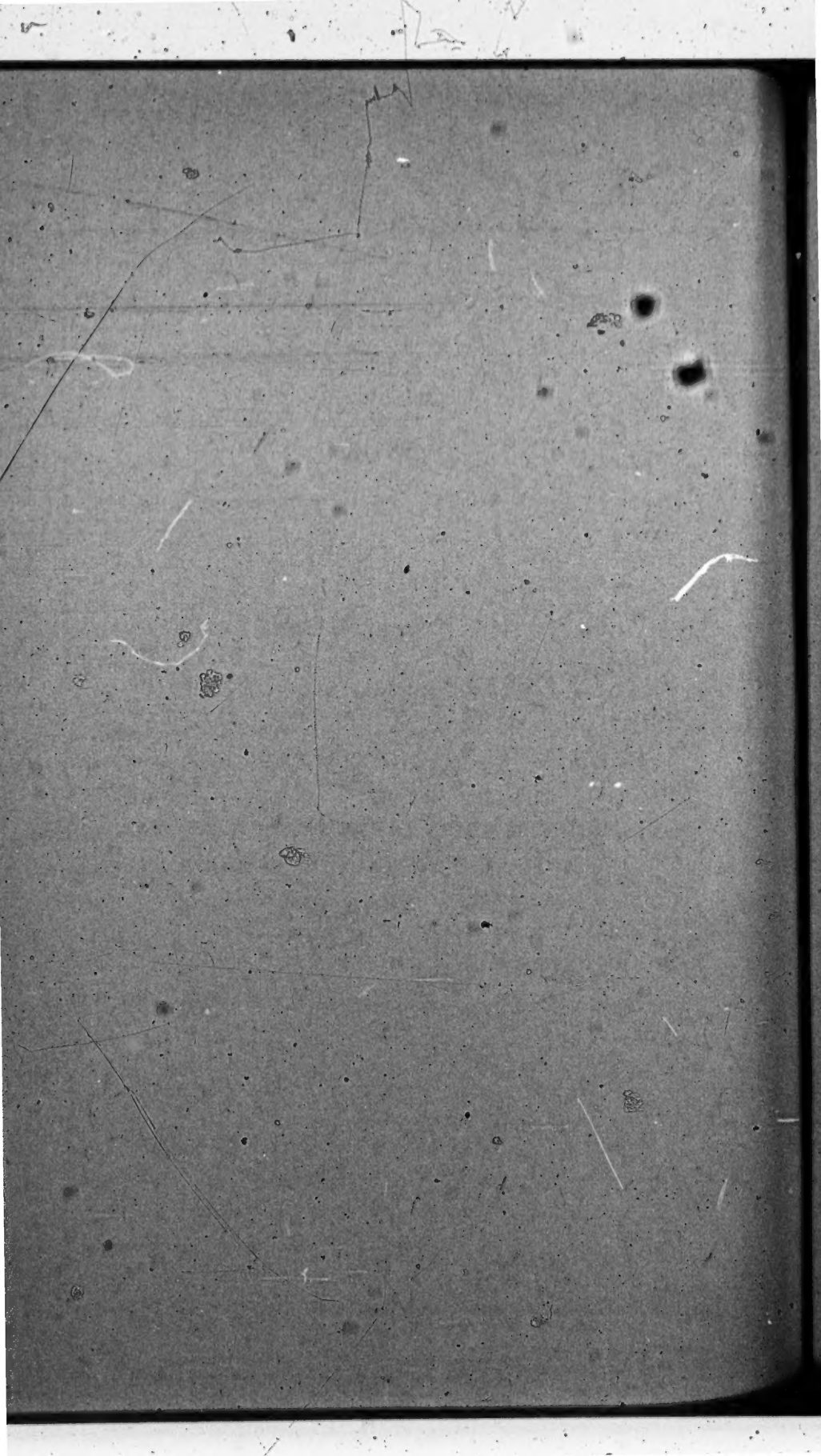

INDEX.

	Page.
Statement of the case	1
Claims of Petitioner	2
Statement of facts	2
The assigned errors present no ground for the granting of a writ	9
I. Respondent's injuries were due to his voluntarily electing to exchange a safe for an unsafe place to work	9
II. Authorizing the jury to award damages to respondent for injuries caused by an unsafe condition which he was engaged in remedying	12
III. Holding Petitioner negligent as to the track's condition with no finding of failure to use ordinary care and prudence to keep it reasonably safe	14
The charge of the court	16
IV. Basing the judgment on a verdict corrupted by passion and prejudice	21
Conclusion	22

TABLE OF CASES.

Page.

Atlantic Coast Line vs. Davis, 279 U. S. 34 12

Atlantic Coast Line vs. Driggers, 279 U. S. 787 12

Baker vs. Great N. R. Co., 83 Minn. 184, 86 N. W. 82 19

Christianson vs. Chicago, St. P. M. & O. R. Co., 67 Minn. 94, 69 N. W. 640 19

Christopher vs. Custom Laundry Co. (Minn.), 229 N. W. 136 21

Estate in re Weber, 163 Minn. 389, 204 N. W. 52 21

Moquin vs. Minneapolis, St. P. & S. S. M. R. Co. (Minn.), 231 N. W. 829-831 11

New York C. R. Co. vs. Johnson, 279 U. S. 319 21

State vs. Peterson, 167 Minn. 216, 208 N. W. 761 21

State vs. Cotter, 167 Minn. 265, 209 N. W. 4 21

Seitz vs. Claybourne, 180 Minn. ..., 231 N. W. 714 21

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STATEMENT OF THE CASE.

Respondent, a brakeman, was injured by the derailment of a freight car upon which he was riding. The derailment was caused by ice covering the rails from one to two inches. The ice was covered by a small drift of snow.

The jury found a verdict in Respondent's favor. The trial court denied a motion for judgment *non obstante* or for a new trial. The Supreme Court of Minnesota in all things upheld the trial court, save that the verdict was reduced from $27,500.00 to $22,500.00.

CLAIMS OF PETITIONER.

Petitioner sets forth four reasons why a writ of certiorari should be granted. They are in substance:

1. The claimed exclusion of the defense that there could be no recovery for injuries sustained through electing to exchange a safe for an obviously unsafe place to work.

2. Error in authorizing the jury to award damages to Respondent for injuries caused by an unsafe condition in remedying which he was engaged.

3. The claim that the jury were instructed that plaintiff could recover regardless of whether Petitioner had exercised ordinary care as to the place of work.

4. The claim that the verdict was the result of passion and prejudice.

STATEMENT OF FACTS.

(Figures in Parentheses Refer to Record Folios.)

This is a simple personal injury action. At the Station of Cloverton, Minnesota, on the day in question, Respondent's duty was to go to the so-called house track, couple onto an empty car, couple this to a car of ties, and then back down the house track. Following this the engine was to come forward and the engineer would operate the flangers on the locomotive and flange out the house track while going in a forward motion. Following this the car of ties was to be switched into the train and the empty car was to be switched back onto the house track, and after it was so switched, Moquin, the brakeman, was to set the brake thereon and leave the empty car.

Flanges are small shovel-like or plow-like appliances fastened to the PILOT of a locomotive. The flanges may be raised or lowered by the engineer. The purpose of the flanges is to remove snow from between the rails and from the inner side of the rails so that the flanges on the wheels

of the locomotives and cars will have free space for running.

A FLANGING OPERATION IS NOT DONE TO REMOVE ICE FROM OVER THE TRACKS. Its purpose is to remove snow or debris so that it will not become hardened and later form ice, which might become dangerous and cause a derailment.

Before the train reached Cloverton the conductor received an order reading as follows:

> "Do a good job of flanging today and advise *what tracks* you flange out. Finish the flanging on No. 50 Tuesday. (Signed) J. E. Mullen" (493) (1911).

When the train arrived at Cloverton, the conductor gave orders to plaintiff, saying:

> "He said 'Tell Dan to *back in* on the house track and after he couples onto that car of ties to *shove down back* down on the house track and flange it out'" (99).

"Dan" was Daniel Carr, the other brakeman, Respondent's fellow servant.

Flanging cannot be done by a box car backing through snow. FLANGING CAN BE DONE ONLY BY THE ENGINE COMING FORWARD, THE FLANGER BEING LOCATED ON THE PILOT OF THE ENGINE.

Before the train reached Cloverton, flanging in addition to other work had been done at four stations.

This flanging was done at Harlis (49) and at Belden (64) and also at Black River and Kingsdale. At each one of these places the flanging operation was performed *after* the locomotive and tender had BACKED through snow. This was done at Belden (65) where the snow was eight or nine inches deep. At each of the other places where the flanging was done before the crew got to Cloverton, the engine

BACKED THROUGH the snow and then came *forward and did the flanging.* This was not disputed. No trouble was experienced at these points.

At the Station of Cloverton there was an empty car and a car of ties on the side track and, under the orders of the conductor to plaintiff, Carr, his fellow brakeman, was to take the engine; couple onto the empty car and the car of ties, back down on the house track, and after this come forward and flange it out.

IT WAS THE INTENTION OF THE CREW TO PUT THE CAR OF TIES INTO THE TRAIN. The movement to the side track was made, the empty car was coupled to the car of ties and the backward movement started down the house track. THIS WAS A PRELIMINARY SWITCHING MOVEMENT AND NOT A FLANGING MOVEMENT. The flanging movement could not be made while the freight car was being backed through the snow.

Plaintiff testified:

"Q. Then the switch would be thrown and then he backed his engine in?

A. Yes, sir.

Q. To the east end of the passing track?

A. Yes, sir.

Q. WHEN HE WAS DOING THAT WOULD HE BE DOING A FLANGING OPERATION AT ALL?

A. NO, SIR.

Q. When he would come back through the snow at the east end what would he do with his FLANGE which was on the pilot?

Mr. Boyle: Objected to as immaterial.

A. WHEN HE GOT CLEAR TRACK he dropped it clear down.

Q. He would drop it down.

The Court: The same ruling. (Exception by defendant.)

Q. FOR WHAT PURPOSE? Just explain the working of the flange after he would drop it down, would he come to the east or west?

A. COME WEST AND THE FLANGE is for the purpose of throwing the snow out from between the rails" (55-57).

After the flanging operation had been completed, it would be Moquin's duty to assist in switching the car of ties into the train and then to ride the empty car back in onto the house track, set the brake thereon and leave it there (126).

"Q. And did YOU have any duty with reference to the flanging operation of either of these tracks?

A. No, sir" (127).

After Moquin got onto the car of ties, his fellow brakeman, Carr, who was on the foot board of the engine, gave a signal to him.

"Q. What did that sign mean?

A. THAT MEANT THAT WE WERE GOING TO SHOVE BACK" (130).

Moquin communicated to the brakeman what the conductor had told him.

"Mr. Davis: Tell the jury what you said to Dan.

A. When Dan got up on the car I told him that the conductor told me to tell him that WE SHOULD SHOVE BACK ON THE HOUSE TRACK and flange that out and go up to the other end and do our switching and back down the passing and flange that out" (132).

From the above quotation it is to be noted that the men

were to shove back onto the house track; that they would THEN come forward and flange the house track out; that they would then do the switching, back down on the passing track and flange that out. In the quotation above the word "and" is used several times but is used in the sense of denoting that which is subsequently to be done. It is used in the same sense as though the words "and thereafter" had been used. This is clear because the FLANGING OPERATION COULD BE CARRIED OUT ONLY WHILE THE CARS WERE GOING FORWARD.

The purpose of a flanging movement is to eliminate the chances of FUTURE DANGER.

A flanging movement is NOT performed for the purpose of REMOVING ICE FROM TRACKS (39-40). The flanging is done to remove the snow. This will PREVENT THE FUTURE ACCUMULATION OR FORMATION OF ICE.

The record does not show that counsel for the railway company at the trial contended the movement was a flanging movement and that, therefore, plaintiff could not recover.

IN THE ENTIRE MOTION TO DIRECT A VERDICT, which is found on pages 546-548, NO CLAIM is made that this was a FLANGING operation instead of a SWITCHING operation.

Moquin testified that MEN WERE NEVER ORDERED TO FLANGE OUT TRACKS WHICH WERE COVERED WITH ICE (39-42). No witness for defendant claimed that men would be ordered to flange when ice completely covered the rails.

After Moquin took his position on top of the car of ties on the house track, he got a back out signal from his fellow brakeman, Carr, the empty car was coupled to the car of ties, and the movement continued down the house track.

Cloverton is a small hamlet of less than 100 people. There

was an ordinary country crossing which was crossed by the car of ties before it reached the point of derailment.

After the cars were started in motion, they went through some small drifts of snow eight to twelve inches in depth and finally into the drift where the derailment happened. The car went through the first drift without any difficulty. It then reached the place of derailment and the wreck occurred.

At the point of derailment sleds had been hauled over the rails and they were covered with ice from one to two inches deep (971). This ice was under the drift of snow.

This ice was present several days before the accident (972-974, 979).

Defendant's section foreman was told about the condition of the track before the derailment occurred (975).

The witness Brewer testified:

"Q. This ice that had been formed across the track, about how far did that extend, in feet, along the track?

A. Well, about from ten to twelve feet, I would say, where this roadway was.

Q. Where the roadway was?

A. Yes, sir.

Q. What kind of ice was it as to being hard or soft ice?

A. It was hard ice, sir.

Q. Had it gotten there suddenly or gradually by accumulation?

A. It had just gradually accumulated there.

Q. Throughout the winter?

A. Traveling back and forth throughout the winter.

Q. Do you know whether you have traveled across there or seen other people travel across there and seen the section foreman around there?

A. I have traveled across there several times myself with a team.

Q. Was the section foreman when you had this talk with him down there, or where did you have this talk with him about the condition of the track?

A. Right at the depot.

Q. Was this before this derailment?

A. Yes, sir" (982-984).

The witness, Charles L. Halstead, who lived at Cloverton, had been employed by the Soo Line as a section laborer (1033).

He was at the scene of the accident the next morning and saw ice on the track (1035-1036). He said ice had formed on both rails for a distance of ten or twelve feet where the teams had been crossing (1039-1040). There was nearly an inch of ice over the top of the rail. At the point of derailment he said that ice would vary from one to two inches thick over both rails (1040). Other evidence was to the same effect (1057, 1063-1064).

This "was good hard ice, packed down by horses' feet" (1066).

The main controversy at the trial was over the question of whether there *was* ice over the rails. Defendant's section foreman said there was no ice (365-370).

A section laborer, Maurer, did not notice any ice (429). Section laborer, Monson, testified to the same effect (455). A roadmaster testified that there was no ice over the rails (1198).

None of the train crew testified as to the condition of the tracks.

One of Petitioner's witnesses testified that soft snow could derail a car even though there were no ice under the snow

(901). But one of Petitioner's witnesses also testified that backing through snow would not cause a derailment; that it was frequently done (936).

There was evidence showing that the car was derailed at the point where the ice covered the rails and that ice covering the rails would be a producing cause of a derailment. When the car was derailed, it tipped partly over and Moquin was thrown from the top and injured. There was no claim at the trial that his position on the car was different from that assumed by any brakeman, even though Petitioner does state that he "precariously" stood on the top of the car.

THE ASSIGNED ERRORS PRESENT NO GROUND FOR THE GRANTING OF A WRIT.

We shall consider as briefly as possible, consistent with presenting a proper picture of the case to the court, Petitioner's claims, intended to be urged, as set forth on Page 11 of the Petition herein.

I. RESPONDENT'S INJURIES WERE DUE TO HIS VOLUNTARILY ELECTING TO EXCHANGE A SAFE FOR AN UNSAFE PLACE TO WORK.

RESPONDENT DID NOT VOLUNTARILY EXCHANGE A SAFE FOR AN UNSAFE PLACE TO WORK. The railway company claimed it was part of his duty to STAY AT THE COUNTRY CROSSING in order to protect it. This contention is followed by the further statement that if he had stayed at the crossing he would not have been injured at the time of the derailment.

Moquin testified that it was his duty to be upon the car to go down the house track in the switching movement and

later to set the brake on the empty car. Petitioner relied upon a company rule reading as follows:

> "A member of the train or engine crew will PROTECT HIGHWAY TRAFFIC at crossings by proceeding each movement over the crossings and see that ALL HIGHWAY TRAFFIC has been STOPPED BEFORE signalling the engineman to proceed."

This rule DOES NOT in terms require the brakeman to STAY at the crossing. Its purpose is for an employee to precede the car over the crossing and see that all highway traffic has been STOPPED. There was NO TRAFFIC at the crossing. There was nothing to "stop."

Defendant's witness Urbahns admitted that the purpose of Rule No. 102 was to PROTECT THE CROSSING.

> "Q. The purpose of Rule 102 so far as it reads is for the purpose of PROTECTING THE CROSSING where travel goes across it, that is *all* you find in the rule, isn't it, in the reading of the rule?
>
> A. Well, *literally*, you might construe it that way" (1542).

Moquin went over the crossing, going toward the car of ties. Defendant's contention is that after he got to the car of ties, he should have turned and again preceded the car over the crossing and that then he should have remained at the crossing. The rule did not require him to remain there. There WAS NO TRAFFIC AT THE CROSSING. THE CROSSING WAS PROTECTED. PROTECTION OF THE CROSSING SATISFIED THE RULE.

Moquin testified he could see five or six blocks each way (1590) and he walked across the crossing toward the car.

> "Q. And when you WALKED OVER THE CROSSING you may tell the jury whether or not there was

anybody coming towards the crossing from either side.

* * * * * * * * *

Q. WAS ANYBODY COMING?

A. No, sir.

Q. AND WHEN YOU SAW NOBODY COMING after walking over the crossing you got up on top of the car?

A. Yes, sir.

* * * * * * * * *

Mr. Davis: And did any vehicles or pedestrians or anybody come across that crossing as you were backing up?

A. NO, SIR" (1592-1594).

Moquin testified that at this crossing at Cloverton, employees of the company habitually, generally, and customarily did the work of protecting the crossing in the same manner that he did on the day in question. There was no violation of the rule. If, however, it could, by any construction, be said that the rule required Moquin to stay at the crossing, then, under the evidence, it conclusively appeared that the rule was customarily and habitually violated with full notice the defendant. The defendant offered no evidence to the contrary.

The trial court held that this rule had no bearing on the case and was inadmissible. The Supreme Court of Minnesota said:

> "Upon the record IT IS DOUBTFUL IF PLAINTIFF HAD VIOLATED the rule, but, if so, such violation had NO CAUSAL CONNECTION with the injury."
>
> *Moquin vs. Minneapolis, St. P. & S. S. M. R. Co.* (Minn.), 231 N. W. 829-831.

This rule is the ONLY BASIS for the contention that

Respondent voluntarily elected to exchange a safe for an unsafe place to work. Under the language of the rule, Respondent had no duty to remain at the crossing, but further than this, Respondent DID NOT KNOW that there was any danger in backing in onto the house track (134). He could not elect to go into a dangerous place if he did not know danger existed. He testified that there was no danger in backing through small snow-drifts. It was conceded that there had been a back-up movement at four other stations on the same day and no trouble had occurred. Moquin knew nothing of the condition of ice over the snow-drift until after he was injured. He made no election or selection as to a place to work. He merely rode a freight car in a movement which he had no reason to believe was dangerous. That the car ran into a track covered with an inch to two inches of ice was something he could not anticipate.

The first claim of error is too inconsequential for serious consideration.

The cases of *Atlantic Coast Line vs. Davis*, 279 U. S. 34, and *Atlantic Coast Line vs. Driggers*, 279 U. S. 787, cited on Page 14 of the Petition herein, are so different from the present case as to facts and applicable rules of law, that a mere reading of them is sufficient to show their inapplicability. The cases will not, therefore, be further discussed.

Coming now to the second claim of the Petitioner:

II. AUTHORIZING THE JURY TO AWARD DAMAGES TO RESPONDENT FOR INJURIES CAUSED BY AN UNSAFE CONDITION WHICH HE WAS ENGAGED IN REMEDYING.

Respondent does not question the general common law rule that a servant engaged in making a dangerous place safe,

with full knowledge of the facts, may assume the risk and not be permitted to recover.

THIS RULE HAS NO APPLICATION. THE CLAIM that Respondent was making a dangerous place safe WAS NOT URGED AT THE TRIAL. Respondent was not attempting to make a dangerous place safe. The place might be kept safe by the flanging movement, which was intended to remove the snow so that ice would not form over the rails. Moquin was engaged in a PURELY PRELIMINARY SWITCHING MOVEMENT and was NOT ENGAGED in a flanging or repairing movement (55-57).

NO WITNESS FOR THE PETITIONER TESTIFIED THAT MOQUIN WAS ENGAGED IN A FLANGING MOVEMENT. The flanger was NOT IN OPERATION at the time of the derailment. The flanger is operated ONLY when the engine is going forward. The derailment occurred when the car was backing down through what was supposedly a harmless snow-drift. No member of the train crew testified they knew there was an inch of ice over the rails under the drift of snow.

We quote from the testimony of Petitioner's witness Urbahns:

> "Q. CAN A FLANGING ORDER BE CARRIED OUT BY BACKING THROUGH SNOW-DRIFTS OR CAN IT BE DONE IN A PROPER WAY?
>
> A. ABSOLUTELY NOT" .(1491).

HAD MOQUIN OR THE CREW KNOWN THAT ICE COVERED THE RAILS, THE ENGINEER WOULD NOT HAVE BEEN ORDERED TO OPERATE THE FLANGER. WHEN ICE OF THIS CHARACTER COVERS RAILS, IT SHOULD BE TAKEN OUT WITH PICK AXES (39-42).

It will be seen, therefore, that PLAINTIFF WAS NOT ENGAGED IN REMEDYING AN UNSAFE CONDITION.

Coming now to the third contention:

III. HOLDING PETITIONER NEGLIGENT AS TO THE TRACK'S CONDITION WITH NO FINDING OF FAILURE TO USE ORDINARY CARE AND PRUDENCE TO KEEP IT REASONABLY SAFE.

We do not question the rule that there can be no recovery unless the proof shows a failure to use ordinary care to the end that the place of work may be kept in a reasonably safe condition.

The charge of the court, taken as a whole, WAS TO THE EFFECT THAT SUCH DEGREE OF CARE WAS REQUIRED BEFORE THE DEFENDANT COULD BE HELD LIABLE.

The trial court inadvertently omitted the word "reasonably" before the word "safe" in one part of the charge. As to this, the Supreme Court of Minnesota in its opinion said that defendant:

> "assigns as error the failure of the court to use the word 'reasonably' before the word 'safe' to which we have referred. Concededly, it should have been used. OBVIOUSLY, its omission was an INADVERTENCE. Counsel FAILED TO CALL THE COURT'S ATTENTION TO IT. UNDER THE WELL-ESTABLISHED RULE, IT CANNOT NOW BE URGED AS ERROR. It is to be noted that the court told the jury that plaintiff claimed defendant had failed to EXERCISE PROPER PRECAUTION to ascertain whether the track was in a 'REASONABLY SAFE condition.' The jury was told that the law required defendant to 'exer-

cise a DEGREE OF CARE COMMENSURATE WITH THE RISKS to prevent the accumulation of ice and snow in such quantity, form and location as to be a menace to the safety of the employees working in the yard'."

At the close of the charge of the court this appears:

By the Court: "Have counsel any other suggestion or request?

Mr. Boyle: No, your Honor" (1866).

There was no previous suggestion or criticism of the omission to use the word "reasonably" before the word "safe." Counsel took no exception to the failure to use the word "reasonably" but apparently assumed the correctness of the charge as indicated by the following exceptions:

"Mr. Fryberger: The defendant excepts to all that part of the court's charge in which he, in substance, instructed the jury that it was the obligation of the defendant to keep the tracks at Cloverton REASONABLY free from snow and ice" (1872).

"The defendant excepts to all that part of the court's charge which, in substance, instructs the jury that defendant would be liable if it allowed snow to remain for an UNREASONABLE length of time" (1872-1873).

Counsel also took an exception to the following:

"The defendant excepts to all that part of the court's charge which, in substance, tells them that it was the duty of the defendant to furnish A REASONABLY SAFE PLACE for the plaintiff to work inasmuch as there is NO EVIDENCE of any nature or description that the place to work was not safe" (1873).

It will be seen from the above exceptions that counsel

proceeded as though the word "reasonably" had been incorporated in the part of the charge complained of.

THE CHARGE OF THE COURT.

In stating the claims of the plaintiff, the court said:

> "Plaintiff claims that snow and ice were permitted to accumulate upon the tracks and that, under the circumstances existing at the time and place in question, this snow and ice remained upon the track A SUFFICIENT LENGTH OF TIME to have enabled the defendant, IN THE EXERCISE OF ORDINARY AND REASONABLE CARE, to have discovered the fact that it rendered the house track unsafe for the passage of cars over it" (1797-1798).

The court also told the jury that if the ice and snow had been on the track a sufficient length of time "so that the defendant BY THE EXERCISE OF ORDINARY AND REASONABLE CARE should and could have known of such condition" that then the jury might find the defendant negligent (1799). All through the charge *negligence* was made the basis of plaintiff's right to recover. At defendant's request the court charged the jury:

> "And again: 'The MERE FACT that the car was derailed and the plaintiff Moquin was injured does not make the defendant railway liable for his injuries. The fact that the ACCIDENT HAPPENED on the railway company's tracks and while its engine and cars were being moved about does not prove nor tend to prove that the railway company was negligent. In cases like this, NEGLIGENCE OF THE RAILWAY MUST BE THE GROUND OF RECOVERY; and BEFORE PLAINTIFF CAN RECOVER HE MUST ESTABLISH by a

fair preponderance of all the evidence that the railway company was NEGLIGENT and that such negligence was the direct and proximate cause of his injuries'" (1827-1829).

The failure to use ordinary care was made the basis of recovery in several places in the charge. We call the court's attention to the following:

"And, furthermore, it is for you to determine from all the evidence in the case whether or not the section foreman in charge of this section of the railroad received ACTUAL NOTICE, that is, knowledge, ACTUAL KNOWLEDGE, whether he was ACTUALLY INFORMED, that there was ice and snow upon the rails of the house track in question A SUFFICIENT LENGTH OF TIME BEFORE THE ACCIDENT TO HAVE ENABLED THE RAILWAY COMPANY, through its employees, TO REMOVE SUCH ICE, if you find it existed, prior to the accident. * * * If, from all the evidence, you are satisfied that the DEFENDANT COULD NOT HAVE REASONABLY ANTICIPATED that an accident might happen on that account, then the defendant would not be negligent" (1800-1801).

In view of the charge, taken in its entirety, Mr. Chief Justice Wilson, speaking for the Supreme Court of Minnesota in this case, said:

"We are of the opinion that the instructions taken as a whole DID NOT LEAD THE JURY TO BELIEVE THAT THE DEFENDANT WAS AN INSURER OF THE SAFETY OF THE PLACE TO WORK."

The portion of the charge particularly complained of is the following:

"The main question before you is first whether or not the defendant railway company WAS NEGLIGENT in its failure to keep this house track in a safe condition for use by its employees, IN THAT IT, as the plaintiff claims, had PERMITTED ICE AND SNOW to accumulate upon this track and SO RENDERED IT IN AN UNSAFE CONDITION, AND that the defendant failed to have PROPER and TIMELY inspection made of the house track in question and that the defendant railway company failed to ascertain whether or not such house track was safe for the passage of cars over that house track" (1795-1796).

It would have been better had the word "reasonably" appeared before the word "safe" in this charge, but it is to be noticed that following the words "safe condition" the court qualifies "safe condition" by saying "in that it * * * permitted ice and snow to accumulate upon the track," etc.

This instruction is different from an instruction laying down an unqualified rule that it is the duty of the defendant to maintain a safe place to work.

The instruction might well read that the question was whether defendant was negligent IN THAT IT PERMITTED ice and snow to be on the track. As the case now stands, Petitioner does not seem to question, and cannot question, in view of the jury's verdict, the fact that the track WAS unsafe, because of the ice and snow thereon. In view of that fact, therefore, the use of the words "safe condition" in the instruction amount to little, because they were followed BY THE QUALIFICATION "IN THAT IT * * * PERMITTED ICE AND SNOW * * * TO ACCUMULATE UPON THIS TRACK."

An ACTUALLY DANGEROUS condition was proven by

the plaintiff. No one claimed the track would be safe if covered with ice. The situation is different than a case where there may be a considerable question whether the condition WAS or WAS NOT dangerous or as to WHAT DEGREE OF CARE should be exercised. IN THIS CASE, NO ONE CONTENDS THAT THE TRACK WAS EVEN IN A REASONABLY SAFE CONDITION IF IT WAS COVERED BY ONE TO TWO INCHES OF ICE.

In the same charge the court refers to PROPER AND TIMELY INSPECTION, which are ELEMENTS OF ORDINARY AND REASONABLE CARE.

A dangerous condition existed, as appears by the overwhelming weight of the testimony and as found by the jury and both lower courts. There was no question of "reasonably" safe but the condition was unqualifiedly DANGEROUS.

With this dangerous condition existing, defendant would be liable if it could reasonably have anticipated that an accident might happen.

Christianson vs. Chicago, St. P. M. & O. R. Co., 67 Minn. 94, 69 N. W. 640.

Baker vs. Great N. R. Co., 83 Minn. 184, 86 N. W. 82.

No claim was made at the trial of any error because of the use of the word "might" in the instruction. Nor was such question raised in the Supreme Court of Minnesota.

It cannot be said, from a reading of the charge, that the jury would naturally understand that an improper standard of care had been given by the court. The words "safe condition" in the charge complained of, if omitted, WOULD NOT CHANGE THE EFFECT OF THE INSTRUCTION. The instruction would simply have been that the question was whether defendant was negligent IN THAT IT PER-

MITTED ICE AND SNOW TO BE UPON ITS TRACKS.

From what has been said, it cannot but be apparent that the claim that the defendant was held liable without a finding of a failure to use ordinary care to keep the track reasonably safe CANNOT BE SUSTAINED. ALL THROUGH THE CHARGE IT APPEARS THAT RECOVERY WAS BASED UPON NEGLIGENCE AND THE FAILURE TO EXERCISE ORDINARY CARE. Furthermore, THERE IS NO CLAIM THAT THE TRACK COULD BE MAINTAINED EVEN IN A REASONABLY SAFE CONDITION WITH ICE FROM ONE TO TWO INCHES OVER THE RAILS.

The Supreme Court of Minnesota in its opinion, in speaking of the inadvertent omission of the word "reasonably" said:

> "OBVIOUSLY, ITS OMISSION WAS AN INADVERTENCE. COUNSEL FAILED TO CALL THE COURT'S ATTENTION TO IT. UNDER THE WELL-ESTABLISHED RULE, IT CANNOT NOW BE URGED AS ERROR."

It is a rule of practice in the State of Minnesota that errors of this type cannot be urged unless they are called to the court's attention and an opportunity be given to correct the alleged error. Defendant failed to comply with this rule. The question of practice is for the state court. It does not present a ground for the granting of a writ of certiorari.

The fourth point relied on for the granting of the writ is as follows:

IV. BASING THE JUDGMENT ON A VERDICT CORRUPTED BY PASSION AND PREJUDICE.

There is NOTHING PREJUDICIAL in the argument of counsel, although the Minnesota Supreme Court did state that some parts of the argument were without justification. HOWEVER, THIS POINT WAS WAIVED BY PETITIONER. At the trial of the case NO EXCEPTION WAS TAKEN to any remarks of counsel. COUNSEL WAS GIVEN NO OPPORTUNITY TO CORRECT OR RETRACT ANY STATEMENT. Under the well settled practice in the State of Minnesota, unless the prejudicial remarks are called to the court's attention at the time, THEY CANNOT LATER BE ASSIGNED AS ERROR.

As stated by the Supreme Court of Minnesota in this case:

> "The rule of procedure in such cases RESTS UPON DEEP PRINCIPLES FROM WHICH WE SHOULD NOT DEPART. IT IS THE SETTLED PRACTICE. *Christopher vs. Custom Laundry Co.* (Minn.), 229 N. W. 136; *State vs. Peterson*, 167 Minn. 216, 208 N. W. 761; *State vs. Cotter*, 167 Minn. 265, 209 N. W. 4; *Estate in re Weber*, 163 Minn. 389, 204 N. W. 52; *Seitz vs. Claybourne*, 180 Minn. . . ., 231 N. W. 714. It gives an opportunity for correction or retraction."

Mr. Chief Justice Wilson further said:

> "No objections or exceptions were made and taken at the time of the argument."

UNDER THE MINNESOTA PRACTICE, THE QUESTION COULD NOT BE RAISED IN THE SUPREME COURT OF MINNESOTA, and clearly it cannot now be raised in the Supreme Court of the United States.

There is nothing in the case of *New York C. R. Co. vs. John-*

son, 279 U. S. 319, cited by counsel for Petitioner, to sustain its contention or which would require or justify the issuance of a writ in this case.

In that case counsel stated matters to be in issue which were not in issue, stating that a defense was made which was not made. Objection was taken at the time to these claims. The point was raised that the objections were not sufficiently specific, but the objections were taken, and, therefore, the case is different from the case at bar, WHERE NO OBJECTION WAS MADE TO THE ARGUMENT and no exceptions taken. Furthermore, no state rule of practice was involved in the Johnson case.

The Johnson case was tried in a Federal Court. The present case was tried in a state court of Minnesota, WHICH HAS ADOPTED A RULE never departed from and resting, as Mr. Chief Justice Wilson said, "upon deep principles from which we should not depart. It is the settled practice." This rule is to the effect that error cannot be assigned unless the matter was called to the court's attention at the time.

PETITIONER FAILED TO COMPLY WITH THE RULE IN MINNESOTA. The question of the adoption or enforcement of such rule is ENTIRELY FOR THE STATE COURTS, and, therefore, the claim of error because of the argument of counsel can afford no ground for the issuance of the writ.

CONCLUSION.

This simple personal injury action arose out of a derailment. NO REAL QUESTIONS OF LAW ARE INVOLVED. NO QUESTION OF THE CONSTRUCTION OF ANY FEDERAL STATUTE IS AT ISSUE. BOTH STATE COURTS held that Respondent should recover. Pe-

titioner had a fair trial of a case in which THE EVIDENCE SHOWS IT WAS BOTH MORALLY AND LEGALLY LIABLE.

No great or far-reaching principles of law could be laid down in this case. ITS DETERMINATION IS NOT ESSENTIAL FOR THE HELP OR GUIDANCE OF COUNSEL OR LITIGANTS IN THE FUTURE. The matters at issue were matters which, under our system of jurisprudence, ARE FOR DETERMINATION BY STATE COURTS. There was no conflict with any Federal rule of liability. The railway company presented fully all the evidence it claimed to have at the trial. The petition should be denied.

Respectfully submitted,

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